Supreme Court, U.S.
FILED
00-247 JUN 27 2000
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

JOSEPH TAMBERELLA, Petitioner
v.
STATE OF NEVADA
EMPLOYMENT SECURITY
DIVISION: STANLEY P. JONES,
ADMINISTRATOR;
Respondent(s)

On Petition For Writ Of Certiorari
To The **UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

JOSEPH TAMBERELLA
Petitioner
P.O. Box 10322
Golden Valley, AZ 86413
520-565-2701

15pp

## QUESTION PRESENTED FOR REVIEW:

Can the State Of Nevada Employment Security Division and its' Administrator, acting in his official capacity (for unemployment compensation claims and subsequent appeals by out-of-state claimants), have immunity from lawsuits, initiated by such claimants, under the 11th Amendment to the United States Constitution, while other states and their comparable unemployment compensation agencies have been held accountable for their actions and inactions regarding benefit claims in Federal Courts?

## REFERENCE TO THE OPINION TO BE REVIEWED

The opinion herein sought to be reviewed was rendered by the Ninth Circuit Court of Appeals, before Circuit Judges Beezer, O'Scannlain and Thomas on April 14, 2000 which denied a panel rehearing to this petitioner, (Appendix A-1). Such court had previously dismissed this petitioner's action citing 11th Amendment immunity defense is valid for the respondent(s) in this matter under the Constitution Of The United States, and also finding that this matter was subject to Federal jurisdiction.(Appendix A-2). This decision overruled the finding of United States District Court, District of Nevada, Judge Johnnie B. Rawlinson, who dismissed the original action for lack of subject matter jurisdiction on March 29,1999.(Appendix A-3).

## JURISDICTION

Federal jurisdiction in this matter has been previously established under 28 U.S.C. §§ 1291 and 28 U.S.C. §§ 1332 (Appendix A-2).

Petitioner requests this Court to exercise its discretion and to review the merits of this controversy as the opinion of the Ninth Circuit Court of Appeals, has decided an important question of federal law that conflicts with decisions rendered by other federal courts and should be settled by this Court.

## STATEMENT OF THE CASE AND FACTS-FEDERAL QUESTIONS RAISED, DETERMINED AND REVIEWED

The case below involves JOSEPH TAMBERELLA, an Arizona resident, and his denial of fair and equal treatment, as required under Federal and State of Nevada regulations,

by the State of Nevada Employment Security Division and its Administrator Stanley P. Jones, acting in his official capacity for unemployment compensation, for out-of-state claimants.

Citing *Dunn v. New York State Dept. of Labor*, D.C.NY 1979, 474 F. Supp 269: *Torres v. New York State Dept. of Labor*, 402 U.S. 968, 91 S. Ct. 1685: *Wheeler v. State of Vermont*, 335 F. Supp. 856 (D.Vt.1972) and *Cal. Dept. of Human Resources v. Java*, 402 U.S. 121, 91 S. Ct. 1347, clearly indicate the right of Federal scrutiny in regards to individual states unemployment agencies and their respective practices when benefits to claimants have either been denied or delayed.

Unemployment compensation and its' subsequent appeals processes were created, mandated and are funded under the authority of the United States government by virtue of the Social Security Act and the Internal Revenue Code. Such programs are interstate in nature, protecting all employees no matter where they live or choose to work. It is not a benefit system unique to the State of Nevada and thus renders moot the point of 11th Amendment immunity for individual states under the United States Constitution. By the lower court upholding this contention, it has placed, *in error*, blatant and biased prejudice on this petitioner for the mere fact that he resides in Arizona but had worked in Nevada. As the above cases cited clearly indicate, had he worked in another state (other than Nevada) he would have been granted the opportunity to present his case in a federal court, when, as an out-of-state claimant, he was denied a fair unbiased appeals hearing to collect his rightfully due benefits.

Under federal law, protection is given to all individuals whose claim for rightful compensation is denied under 42 U.S.C. §§ 503 (a)(3) and 42 U.S.C. §§ 503 (a)(1) which prohibits the wrongful deprivation of such benefits. Most certainly, these laws were enacted to protect the public

from problems that arise within the various states and their respective benefit agencies.

The United States Supreme Court, itself, in *Board of Regents v. Roth*, 408 U.S. 564,577, 92 S.Ct.2701,33 L.Ed.2d 548 (1972) addressed proper appeals procedures and providing a person their rightful entitlements. States' immunity is not universal, citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct.441, 52 L.Ed.714 (1908). This petitioner has been denied his unemployment compensation since March of 1996 and such lengthy delay further compels federal intervention citing *Fusari v. Steinberg*, 419 U.S. 379,389, 95 S. Ct. 533,539, 42 L.Ed.2d 521,reh'g denied, 420 U.S. 955,95 S.Ct.1340, 43 L. Ed. 2d 433 (1975).

While the agency responsible for determining this petitioner's benefits ignored and denied acceptance of his compelling evidence (which is required by law) the District Court of Nevada did evaluate such items in a civil action brought on against the petitioner's former employer and found the petitioner *was* subject to a tortuous discharge and fraud had been committed by the employer and its agents, (APPENDIX A-4). Despite this finding and the "urging" of the Attorney General Of The State Of Nevada, (APPENDIX A-5), the State of Nevada refused to grant benefits.

Under Nevada law, specifically N.R.S. 612.717, a governmental mechanism exists for the Administrator to grant benefits and invoke penalties onto an employer when fraud has been detected to deny an employee their unemployment benefits, (APPENDIX A-6). Despite such law, the Administrator failed in his duty to do this, further breaching public policy (APPENDIX A-7).

While employed in Nevada, petitioner was subject to Arizona tax deductions on his paychecks, a portion of which funds Arizona's unemployment department, further indicating unemployment compensation is an interstate

function of state governments and not a sole function of the State of Nevada.

## REASONS FOR GRANTING THE WRIT

1. This court must uphold the regulations and appropriate conduct expected of state's unemployment departments as established by the Social Security Act and Internal Revenue Codes.
2. Such federal intervention, which was not granted by the lower federal courts to this petitioner, must be fairly considered now to prevent this unfair, biased Nevada "s tate svstem" and the actions of it's administrator from proliferating harm and burdens to others who have proven beyond any doubt they are entitled to their unemployment benefits and any penalties from their employer as required by law.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioner respectfully urges this Honorable Court to exercise its discretion and to review the merits of the subject controversy. The petitioner would further request that this Court, after merits review, grant this subject petition, quash the opinion of the Ninth Circuit Court of Appeals and remand this cause with directions to reinstate petitioners cause of action.

Respectfully submitted,

JOSEPH TAMBERELLA
Petitioner
P.O. Box 10322
Golden Valley, AZ 86413
520-565-2701

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT
No. 99-15706

D.C. No. CV-99-00064-JBR
Nevada (Las Vegas)

ORDER

FILED
APR 14 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSEPH TAMBERELLA,

Plaintiff-Appellant

v.

STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; STANLEY P. JONES; ATC-VANCOM OF NEVADA

Defendants-Appellees

Before: BEEZER, O'SCANNLAIN, and THOMAS, Circuit Judges

Tamberella's petition for panel rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-15706

D.C. No. CV- 99-00064-JBR

JOSEPH TAMBERELLA,

Plaintiff - Appellant,

v.

STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; STANLEY P. JONES; ATC-VANCOM OF NEVADA,

Defendants- Appellees

FILED
JAN 25 2000
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

Appeal from the United States District Court for the District of Nevada.

Johnnie B. Rawlinson, District Judge, Presiding

submitted January 18, 2000.

Before: BEEZER, O'SCANNLAIN, and THOMAS, Circuit Judges.

Joseph Tamberella appeals pro se the district court's judgment dismissing for lack of subject matter jurisdiction his action challenging the state of Nevada's denial of unemployment compensation benefits. We have jurisdiction under 28 U.S.C. SS 1291. We may affirm on any basis fairly supported by the record, see *Miofsky v. Superior Court*, 703 F.2d 332,337 (9th Cir. 1983), and we affirm.

The district court erred by dismissing Tamberella's action for lack of subject matter jurisdiction because Tamberella established federal diversity jurisdiction pursuant to 28 U.S.C. SS 1332. However, we affirm the dismissal of Tamberella's claims against the State of Nevada Employment Security Division and Stanley P. Jones based on their Eleventh Amendment Immunity. See *Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (stating that the Eleventh Amendment bars suits against state agencies); *Han v. United States Dep't of Justice*, 45 F. 3d 333, 338 (9th Cir. 1995) (per curiam) (stating that the Eleventh Amendment bars suits against state officials in their official capacities)...

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-99-0064-JBR (LRL)

JOSEPH TAMBARELLA,

Plaintiff,

v.

STATE OF NEVADA EMPLOYMENT SECURITY DIVISION, et al.,

Defendants.

ENTERED AND SERVED
MAR 29 1999
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

This matter having come before the Court on Defendant ATC/Vancom of Nevada, Ltd.'s (ATC/Vancom) Motion for Summary Judgment (#2) and on Defendant State of Nevada's Motion to Dismiss (#4). Because this Court lacks subject matter jurisdiction, this case is being dismissed.

Accordingly,

It IS **Ordered** that this case is dismissed for lack of subject matter jurisdiction.

DATED this 25th day of March 1999.

Johnnie B. Rawlinson
United States District Judge

[1]The Court recognizes that Defendant's correct name is ATC/Vancom of Nevada, Ltd. However, to avoid confusion in the record, the Court will continue to refer to the Defendant as named in the Complaint.

App. A-4

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| JOSEPH TAMBERELLA<br>Plaintiff,<br><br>v.<br>ATC/VANCOM OF NEVADA LIMITED PARTNERSHIP, INC | CASE NO.<br>A 360017<br>DEPT. NO.<br>XVI<br>DOCKET NO<br>U<br>**ARBITRATION**<br>96-2338 |

FILED
Jun 9 10 15 AM '97

Having heard the testimony of the witnesses, reviewed the evidence, read the briefs of the parties and heard arguments of counsel, the Arbitrator finds as follows and enters this award accordingly,

## FINDINGS OF FACT

Plaintiff, Joseph Tamberella, was employed by defendant, ATC/Vancom in its Laughlin, Nevada transit operation from October 1994 until February 8, 1996 when his employment was terminated by his immediate supervisor, Shawn Brophy in direct retaliation for plaintiff's "whistle blowing" and as result of personal animosity against Plaintiff.

Brophy, O'Keefe and Emily Gilbert subsequently attempted to create a paper trail which would make it appear that Plaintiff was terminated for abandonment of his job.

## CONCLUSIONS OF LAW

Plaintiff's retaliatory termination by ATC/Vancom was in violation of public policy and defendant is liable for any damages sustained by Plaintiff by reason of this tortious discharge.

DATED this 9th day of June 1997.

CORBY D. ARNOLD, ESQ., ARBITRATOR

CORBY D. ARNOLD, ESQ.
PROFESSIONAL CORPORATION
State Bar No. 000132

The Atrium - Suite 780
333 North Rancho Drive
Las Vegas, Nevada 89106

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

Mr. Joseph Tamberella
P. O. Box 10322
Golden Valley, Arizona 86413-2322

July 10, 1997

Re: Nevada Employment Security Department / *Tamberella v. ESD.*

Dear Joe:

I have reviewed the materials which you faxed to me on the above-referenced matter. I have discussed the information regarding your arbitration decision with a private lawyer for ESD here in Northern Nevada. That lawyer intends to review the information to determine if it can speed up a resolution of your appeal in the Nevada Supreme Court.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: Robert L. Auer

ROBERT L. AUER
Deputy Attorney General
Boards & Commissions Section
(702) 687-3522

## PENALTIES

Section 612.717 of the Nevada Revised Statutes provides:

If the administrator finds that any employer or any employee, officer or agent of any employer has willfully made a false statement or representation or has willfully failed to report a material fact concerning the termination of a claimant's employment, he shall make a determination thereon, charging the employer's reserve account not less than two nor more than sixteen times the weekly benefit amount of such claimant. The administrator shall give notice to the employer of a determination under this section. Appeals may be taken from the determination in the same manner as appeals from determinations on benefit claims.

(APP. A-7)

STATE OF NEVADA

CAROL A. JACKSON
*Director*

STANLEY P. JONES
*Administrator*

**DEPARTMENT OF**
**EMPLOYMENT, TRAINING AND REHABILITATION**
**EMPLOYMENT SECURITY DIVISION**
**500 E. Third Street**
**Carson City, Nevada 89713-0001**

Dear Mr. Tamberella:

This will acknowledge your letter of December 4, 1998.

Until such time as the Supreme Court decides the matter, there is no further action to be taken.

Sincerely,

Stanley P. Jones
Administrator

Joseph Tamberella
P.O. Box 10322
Golden Valley, Arizona 86413-2322